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TENGKU ADNAN TENGKU MANSOR v. PP

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
RHODZARIAH BUJANG JCA
HADHARIAH SYED ISMAIL JCA
B [CRIMINAL APPEAL NO: W-05-407-09-2019]
15 MAY 2020

CRIMINAL PROCEDURE: *Judge – Recusal of – Application for – Judge presided over co-accused's case – Whether presiding judge to accused who had not pleaded*
C *guilty ought to refrain from presiding over his trial after accepting plea of guilt of co-accused – Whether judge might be prejudiced against accused – Whether there was real danger of bias*

The appellant was charged under s.16(a)(A) of the Malaysian
D Anti-Corruption Commission Act 2009 ('the Act'), to wit, accepting a bribe in the sum of RM1,000,000 from one Tan Eng Boon ('Tan'). An alternative charge under s. 165 of the Penal Code was also preferred against him. Tan was similarly charged under the Act in the Sessions Court for giving the said bribe to the appellant, with also an alternative charge for abetment of the alternative charge faced by the appellant. Subsequently, both cases were
E transferred, upon an application filed by the appellant and the Public Prosecutor ('PP'), under ss. 417 and 418 of the Criminal Procedure Code ('CPC') respectively, to the High Court for trial and upon further application by the latter, a joint trial of the said cases were ordered by the High Court Judge ('HCJ'). However, pursuant to a plea bargain entered into between Tan
F and the PP under s. 172 of the CPC, Tan pleaded guilty to the alternative charge where he was sentenced to a fine of RM1,500,000 in default one year imprisonment. The next day, which was the day fixed for the joint trial to begin, the appellant filed a notice of motion for an order, *inter alia,* that the HCJ recuses himself from hearing the case against the appellant on the
G principal ground that His Lordship may be biased on account of Tan's case, but which the HCJ dismissed. Hence, this appeal.

Held (allowing appeal)
Per Rhodzariah Bujang JCA delivering the judgment of the court:

H **(1)** In spite of the declaration by the HCJ, that he would not be prejudiced against the appellant despite presiding over Tan's case, the danger he might be so was there and was real. This was because how could he, or any presiding judge for that matter, having not just looked at but also considered the facts of the case as well as the documentary exhibits tendered in support of the plea of Tan that he offered the bribe to the
I appellant which was accepted, be able to completely obliterate this crucial fact from his mind? The test here was not whether there would be a real bias on his part but a danger that there be so. The test is promulgated on the basis of a very low threshold of a possibility and not

a probability of bias. It was that danger, given the plea of guilty of Tan which the HCJ had accepted, which could not be effaced. In other words, such a possibility of bias could not be ruled out, even though the probability could. The *ratio* in this decision should apply to all tiers of court in that a presiding judge in the same situation should in all fairness to an accused who had not pleaded guilty, refrain from presiding over his trial after he had accepted the plea of guilty of his co-accused. To reiterate the words in the case of *Dato' Tan Heng Chew v. Tan Kim Hor*, this was 'in order to maintain the highest standard of public confidence in the judiciary.' (paras 12 & 13)

Case(s) referred to:
Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 CLJ 577 FC ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai GelugorDengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC ***(refd)***
PP v. Mohd Amin Mohd Razali & Ors [2002] 5 CLJ 281 HC ***(refd)***
Regina v. Gough [1993] AC 646 ***(refd)***
Yap See Teck v. PP [1983] 1 CLJ 97; [1983] CLJ (Rep) 953 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 172, 417, 418
Malaysian Anti-Corruption Commission Act 2009, s. 16(a)(A)
Penal Code, s. 165

For the appellant - Tan Hock Chuan, Satharuban, Michelle Lai, Natalie Tan & Aaron Lau; M/s Tan Hock Chuan & Co
For the respondent - Julia Ibrahim, Lailawati Ali, Haderiah Siri, Rullizah Abdul Majid, Natasha Abdul Aziz; DPP

[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal Application No: WA-44-231-09-2019 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Rhodzariah Bujang JCA:

[1] The appellant in this appeal was charged under s. 16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009 ("the Act") to wit, accepting a bribe in the sum of RM1,000,000 from one Tan Eng Boon ("Tan"). An alternative charge under s. 165 of the Penal Code was also preferred against him. The said two charges read:

Main Charge:

Bahawa kamu, pada 27 Disember 2013, di CIMB Bank Berhad, Cawangan Pusat Dagangan Dunia Putera, Level 2, Podium Block, Pusat Dagangan Dunia Putera, Jalan Tun Ismail, di dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima bagi diri kamu suatu suapan, iaitu,

wang berjumlah RM1,000,000.00 daripada Tan Eng Boon melalui cek Public Bank bernombor 300109 milik syarikat Pekan Nanas Industries Sdn Bhd yang telah didepositkan ke dalam akaun CIMB Bank no. akaun 14200008384058 milik kamu, sebagai upah bagi diri kamu kerana telah melakukan suatu perkara yang sebenar, iaitu, meluluskan permohonan Nucleus Properties Sdn Bhd (sekarang dikenali sebagai Paragon City Development Sdn Bhd) untuk menaikkan ratio plot berkaitan dengan pembangunan Lot 228, Jalan Semarak, Kuala Lumpur, dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah perenggan 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 [Akta 694] yang boleh dihukum di bawah subseksyen 24(1) Akta yang sama.

Alternative Charge:

Bahawa kamu, pada 27 Disember 2013, di CIMB Bank Berhad, Cawangan Pusat Dagangan Dunia Putera, Level 2, Podium Block, Pusat Dagangan Dunia Putera, Jalan Tun Ismail, di dalam Wilayah Persekutuan Kuala Lumpur, sebagai seorang penjawat awam iaitu Menteri Wilayah Persekutuan, telah menerima untuk diri kamu sendiri suatu barang berharga dengan tiada balasan, iaitu, wang berjumlah RM1,000,000.00 daripada Tan Eng Boon melalui cek Public Bank bernombor 300109 milik syarikat Pekan Nanas Industries Sdn Bhd yang telah didepositkan ke dalam akaun CIMB Bank no. akaun 14200008384058 milik kamu, yang mana kamu ketahui Tan Eng Boon sebagai seorang Pengarah di syarikat Nucleus Properties Sdn Bhd (sekarang dikenali sebagai Paragon City Development Sdn Bhd) ada perhubungan dengan kerja-kerja rasmi kamu sendiri, dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 165 Kanun Keseksaan.

[2] Tan was similarly charged under the Act in the Sessions Court for giving the said bribe of RM1,000,000 to the appellant with also an alternative charge, that is, for abetment of the alternative charge faced by the appellant. The charges against him read:

Main Charge:

Bahawa kamu, pada 27 Disember 2013, di CIMB Bank Berhad, Cawangan Pusat Dagangan Dunia Putera, Level 2, Podium Block, Pusat Dagangan Dunia Putera, Jalan Tun Ismail, di dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah memberikan suatu suapan bagi faedah kepada Tengku Adnan Bin Tengku Mansor (No. K/P: 501220-04-5119), iaitu, wang berjumlah RM1,000,000.00 melalui cek Public Bank bernombor 300109 milik syarikat Pekan Nanas Industries Sdn Bhd yang telah didepositkan ke dalam akaun CIMB Bank no. akaun 14200008384058 milik beliau, sebagai upah bagi beliau kerana telah melakukan suatu perkara yang sebenar, iaitu, meluluskan permohonan Nucleus Properties Sdn Bhd (sekarang dikenali sebagai Paragon City Development Sdn Bhd) untuk menaikkan ratio plot berkaitan dengan pembangunan Lot 228, Jalan Semarak, Kuala Lumpur, dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah perenggan 16(b)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 [Akta 694] yang boleh di hukum di bawah subseksyen 24(1) Akta yang sama.

Alternative Charge:

Bahawa kamu, pada 27 Disember 2013, di CIMB Bank Berhad, Cawangan Pusat Dagangan Dunia Putera, Level 2, Podium Block, Pusat Dagangan Dunia Putera, Jalan Tun Ismail, di dalam Wilayah Persekutuan Kuala Lumpur, telah bersubahat dalam perlakuan kesalahan oleh Tengku Adnan bin Tengku Mansor (No. K/P: 501220-04-5119), yang sebagai seorang penjawat awam iaitu Menteri Wilayah Persekutuan, telah menerima untuk diri beliau suatu barang berharga dengan tiada balasan, iaitu, wang berjumlah RM1,000,000.00 daripada kamu melalui cek Public Bank bernombor 300109 milik syarikat Pekan Nanas Industries Sdn Bhd yang telah didepositkan ke dalam akaun CIMB Bank no. akaun 14200008384058 milik beliau, yang mana beliau ketahui kamu sebagai seorang Pengarah di syarikat Nucleus Properties Sdn Bhd (sekarang dikenali sebagai Paragon City Development Sdn Bhd) ada perhubungan dengan kerja-kerja rasmi beliau sendiri, yang mana kesalahan tersebut telah dilakukan hasil persubahatan kamu, oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 109 Kanun Keseksaan dibaca bersama seksyen 165 Kanun yang sama.

[3] Subsequently, both cases were transferred, upon application filed by the appellant and the Public Prosecutor under s. 417 and s. 418 of the Criminal Procedure Code ("CPC") respectively, to the High Court for trial and upon further application by the latter, a joint trial of the said cases were ordered by the learned High Court Judge ("HCJ"). The said trial was slotted to start on 18 September 2019. However, pursuant to a plea bargain entered into between Tan and the Public Prosecutor under s. 172 of the CPC, Tan pleaded guilty to the alternative charge wherein he was sentenced to a fine of RM1,500,000 in default one year imprisonment. This happened on 17 September 2019. The next day, which was the day fixed for the joint trial to begin, the appellant filed a notice of motion for an order, *inter alia*, that the learned HCJ recused himself from hearing the case against the appellant on the principal ground that His Lordship may be biased on account of Tan's case but which the learned HCJ dismissed. Hence, this appeal before us which we allowed and our reasons for deciding so are as follows. However, first we would lay out the law governing the application at hand.

Real Danger Of Bias

[4] As rightly laid out by the learned HCJ in His Lordship's judgment and accepted by both learned counsel for the appellant and the learned Deputy Public Prosecutor ("DPP") in their written submissions before us, the test which the court must apply in determining an application for recusal is the real danger of bias test. This test was derived from the judgment of Lord Goff in the House of Lord's case of *Regina v. Gough* [1993] AC 646 and adopted by our Federal Court in not just one but three cases which had been considered either by the learned HCJ and/or highlighted to us in the said written submissions. The three cases are:

A (i) *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1; [1993] 3 MLJ 1;

(ii) *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701; [2002] 1 MLJ 321; and

(iii) *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577; B [2006] 2 MLJ 293.

[5] In the words of Lord Goff, this was how the test was formulated at p. 670:

> In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable C in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think D it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. *Finally, for the* E *avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the* F *sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him*; though, in a case concerned with bias on the part of a justices' clerk, the court should go on to consider whether the clerk has been invited to give the justices advice and, if so, whether it should infer that there was a real danger of the clerk's bias having infected the views of the justices adversely to the G applicant. (emphasis added)

[6] Mohamed Dzaiddin CJ in *Mohamed Ezam*'s case (*supra*) succinctly states at p. 706 (CLJ) at p. 325 (MLJ) of the report on the adoption of the above test as follows:

> H Having considered the authorities cited and their reasonings, we would follow *Gough* which is that the test to be applied in the present case is the 'real danger of bias' test. Hence, the question here is whether having regard to the facts and circumstances, was there a real danger of bias on the part of the learned trial judge when he heard the *habeas corpus* application involving the appellants?

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[7] As explained by Edgar Joseph Jr FCJ, in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; and reproduced by the learned HCJ in his grounds of judgment:

> The 'real danger' test favoured in *Gough* could be seen as a compromise between the 'reasonable suspicion' of bias test and the 'real likelihood' of bias test so as to stress that **the Court is contemplating a lower standard than 'likelihood' or 'probability of bias', that is to say, a 'real possibility of bias**': see *Gough* at pp. 668C-D, 670E-F, per Lord Goff; p. 671B-C, per Lord Woolf.
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> It is also important to note that the question of bias has to be answered by considering all the facts not merely by reference to the view of the hypothetical reasonable man (*R V Gough,* per Lord Goff, at p 670D-E).
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> (emphasis added)

[8] The learned HCJ, after examining the law as aforesaid, held firstly, as follows:

> [27] In light of the afore-mentioned principles on recusal, I find it difficult to accede to the request of the applicant. The fears that I may have been influenced with the facts of the case as admitted by DTEB are in my judgment totally unfounded as they are wholly unsubstantiated. Counsel for the applicant emphasized that the applicant genuinely felt that he would not get a fair trial because of the facts which had been made known to me, the likelihood of DTEB being called as a prosecution witness and the strong observations I had made against corruption. The point being I would as such probably believed DTEB and the evidence he may give in this trial against the applicant.

Then in para. 34, the learned HCJ made this finding:

> [34] Based on a number of case law authorities, the fact that this Court recorded the facts of the case against the former co-accused DTEB and sentenced him for the offence under Section 165 of the Penal Code would NOT be prejudicial to the applicant because even if the trial against the applicant is transferred to another Court, it is still open for the prosecution to elicit from DTEB the facts of the case and the fact that he had pleaded guilty and sentenced. It would therefore not make any real difference because if the case against the applicant is transferred, the same facts as admitted by DTEB could still be introduced in that trial through DTEB if and when he is called as a prosecution witness.

[9] In arriving at the said finding, the learned HCJ considered and followed the High Court decision in *Yap See Teck v. PP* [1983] 1 CLJ 97; [1983] CLJ (Rep) 953 where similarly a co-accused in the Sessions Court pleaded guilty to a charge of gang robbery, was then made a prosecution witness and an application by the appellant to have the trial heard before another President of the Sessions Court (as the judicial officer was known then) was rejected. Mohd Azmi J who heard the appeal against the conviction of the appellant held at p. 954 that:

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> [3] The fact that the learned President had recorded the brief facts of the prosecution case would not, in the Court's view, be prejudicial to the appellant, because as correctly stated by the learned President that even if the appellant and the 2nd accused were to be tried before another President, it would still be open to the prosecution to elicit from him the facts of the prosecution case including the fact that he had pleaded guilty to the charge.

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[10] With much due respect to the learned HCJ, the just-quoted judgment was made without the benefit of the real danger of bias test adopted by our apex court as laid out earlier and of the decision of the High Court in *PP v. Mohd Amin Mohd Razali & Ors* [2002] 5 CLJ 281; [2002] 5 MLJ 406 which

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followed *Yap See Teck*'s case (*supra*). Though decided after the test had been so approved, also did not take into consideration the same.

[11] In determining this appeal, we not only have the test at the forefront of our mind but what the Federal Court had said in *Dato' Tan Heng Chew*'s

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case (*supra*) at p. 589 (CLJ); at p. 301 (MLJ), which is that we are in a more advantageous position than the learned HCJ when it comes to considering the merit of an application for recusal. The exact words in the said judgment at para. 25 read:

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> [25] The learned High Court judge said she would not be biased. It may be so. But, viewed objectively, the question is whether, in the circumstances of the case, there is a real danger of bias on her part, even though unintentionally. *In this respect, I think that the Court of Appeal and this court are in a better position to assess since the Court of Appeal and this court are not directly involved in it. So, if on the facts and in the circumstances of the case, this court finds that there is a real danger of bias, even though the trial judge feels*

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> *that she is not inclined to, I think that in the interest of justice, she should be advised to recuse herself.*
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> (emphasis added)

Subsequently, the Federal Court posed this question which is also pertinent to the appeal before us:

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> [31] So, *considering all the circumstances of the case, objectively viewed, is there a real danger of bias on the part of the learned judge if she were to continue to try the suit? While she feels she may not be, my answer is in the affirmative. In this situation, if I were to err, I would prefer to err on the side of recusal.* I am being cautious in order to maintain the highest standard of public confidence

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> in the judiciary. But, I would like to add that each case is to be decided on its own facts and the court should be vigilant not to allow parties to do 'judge-shopping' by recusal of judges. (emphasis added)

[12] Applying the principle as stated above and in spite of the declaration by the learned HCJ in a similar vein, though worded differently in para. 45

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of His Lordship's judgment, that he would not be prejudiced against the appellant despite presiding over Tan's case, we are of the considered view that the danger he might be so is there and is real. This is because how could he, or any presiding judge for that matter, having not just looked at but also

considered the facts of the case as well as the documentary exhibits tendered in support of the plea of Tan that he offered the bribe to the appellant which was accepted, be able to completely obliterate this crucial fact from his mind? In saying this we must be quick to state that we are not in any way questioning the integrity of the learned HCJ or his ability to decide the appellant's case in accordance with the evidence adduced before him. We are also equally mindful that such evidence adduced by both sides would be subject to cross-examination and would be given a maximum evaluation by the learned HCJ. However, we wish to reiterate that the test here is not whether there would be a real bias on his part but a danger that there be so and we must bear in mind the words of Lord Goff that the test is promulgated on the basis of a very low threshold of a possibility and not a probability of bias. It is that danger, given the plea of guilty of Tan which the learned HCJ had accepted, which in our view cannot be effaced. In other words, such a possibility of bias could not be ruled out, even though the probability could.

[13] We must also state that we are not in any way being personal for we believe that the *ratio* in this decision should apply to all tiers of court in that a presiding judge in the same situation should in all fairness to an accused who had not pleaded guilty, refrained from presiding over his trial after he had accepted the plea of guilty of his co-accused. To reiterate the words of Abdul Hamid Mohamad FCJ in *Dato' Tan Heng Chew*'s case (*supra*) which we had earlier reproduced, this is "in order to maintain the highest standard of public confidence in the judiciary."

[14] For the reasons stated above, we have decided to allow the appeal and order that the trial of the appellant be heard before another judge/Judicial Commissioner.